

Letter of Findings: 03-20120542; 04-20120543; 10-20120544
Gross Retail; Withholding; Food and Beverage Taxes
For the Years 2009, 2010, and 2011

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ISSUE

I. Estimated Liabilities – Gross Retail, Food and Beverage, and Withholding Taxes.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1; IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-3-4-8(f); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4; IC § 6-8.1-5-4(c); IC § 6-8.1-5-1(b); IC § 6-9-12-2; IC § 6-9-12-3; IC § 6-9-12-4; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it is entitled to a review of the supplemental documentation belatedly provided the Department of Revenue subsequent to a multi-issue tax audit.

STATEMENT OF FACTS

Taxpayer is an Indiana business which operated three taverns. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The audit was found that "[T]axpayer failed to provide proper records, and [that] the audit was conducted with the best information available." The audit resulted in the assessment of additional withholding, gross retail, and food and beverage taxes. Taxpayer disagreed and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Estimated Liabilities – Gross Retail, Food and Beverage, and Withholding Taxes.

DISCUSSION

Taxpayer operated taverns at three different locations. The Department's audit found that Taxpayer had failed to maintain records sufficient to determine Taxpayer's various tax liabilities. Additionally, the audit found that Taxpayer had operated its businesses more than three days each week and – contrary to Taxpayer's earlier representation – did have employees working at the tavern locations.

Therefore, the audit prepared a report based on the best information available. The Department used information from the Census Bureau, consumer price index, and the scanty records provided by Taxpayer.

Indiana law provides that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." IC § 6-8.1-5-1(b). Even a cursory review of the audit's report reveals that the original records provided by Taxpayer were insufficient and that the Department was fully justified in making the assessments it did.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4. In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

The Department assessed Taxpayer sales tax. IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." The retail merchant collects "the tax as agent for the state." IC § 6-2.5-4-1(b).

The Department assessed "food and beverage tax." The city-county council of a county that contains a consolidated city may adopt an ordinance to impose an excise tax, known as the county food and beverage tax, on any transaction in which food or beverage is furnished, prepared, or served as provided by IC § 6-9-12-3 and IC § 6-9-12-2. The same exemptions that are allowed to retail merchants under IC § 6-2.5 are allowed for taxpayers that are subject to Indiana's county food and beverage tax. IC § 6-9-12-4. The food and beverage tax "applies to any transaction in which food or beverage is furnished, prepared, or served." IC § 6-9-12-3.

The Department also assessed Taxpayer withholding tax. The proposed withholding taxes were assessed against the Taxpayer pursuant to IC § 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the

department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

During the hearing, Taxpayer belatedly provided documentation which it asserts would result in a decrease in the amount of tax owed. Although this Letter of Findings makes no determination as to the amount of tax owed, the Department is prepared to agree that the records warrant review.

The disputed tax stems directly from Taxpayer's failure or inability to maintain or supply the necessary records during the initial audit. Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c) of demonstrating that the original assessments were "wrong." Nonetheless, The Department's Audit Division is requested to review the supplemental information and to make whatever adjustments it deems warranted.

FINDING

Taxpayer's protest is sustained subject to audit review.

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